Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

MARC FELDMAN,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit held, under the "genuine dispute" doctrine, that the District Court was correct in granting summary judgment in favor of the insurer, Respondent Allstate, on a state court cause of action for breach of the implied covenant of good faith and fair dealing. The Court concluded that Allstate had conducted a reasonable investigation of the insurance claim and, that the evidence relied on by Allstate tended to indicate that the claim was fraudulent. In support of this conclusion, the Court held that Allstate had no affirmative duty to provide the insured, Petitioner Feldman, with an opportunity to directly respond to the evidence relied upon by Allstate to deny the claim. Allstate refused to provide Feldman with the evidence that it had relied on to deny the insurance claim.

The questions presented are as follows:

1. Did the Ninth Circuit err when it concluded that the insurer, Allstate, had no affirmative duty to provide the insured, Feldman, with an opportunity to respond to the evidence used to deny the insurance claim?

2. Under California law, and given Allstate's duty to conduct a thorough investigation of an insurance claim, did Allstate have an affirmative duty to provide Feldman with an opportunity to respond to evidence relied on by Allstate to deny his claim?

3. Assuming that Allstate had an obligation to provide Feldman with an opportunity to respond to the evidence, are there questions of fact as to whether Allstate's investigation was reasonable?

PARTIES TO THE PROCEEDING

The parties to the proceedings are set forth in the case caption. Petitioner Marc Feldman is an individual.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

I. Overview of the Case 1

II. Factual Background of the Case 3

REASONS FOR GRANTING THE WRIT 5

1. The Ninth Circuit erred when it concluded that the insurer, Allstate, had no affirmative duty to provide the insured, Feldman, with an opportunity to respond to the evidence used to deny the insurance claim. 6

2. Under California law, and given Allstate's duty to conduct a thorough investigation of an insurance claim, Allstate have an affirmative duty to provide Feldman with an opportunity to respond to evidence relied on by Allstate to deny his claim. 8

3. Assuming that Allstate had an obligation to provide Feldman with an opportunity to respond to the evidence, there are questions of fact as to whether Allstate's investigation was reasonable as a matter of law. 9

CONCLUSION 10

APPENDIX

Appendix A
Ninth Circuit Order Denying Rehearing - 4/3/03 . . . . . 1a

Appendix B
Ninth Circuit Opinion - 3/5/03 . . . . . 2a

Appendix C
District Court Order - 7/2/01 . . . . . 18a

TABLE OF AUTHORITIES

Page

Cases:

Chateau Chamberay Homeowners Assn. v. Associated International Ins., 90 Cal. App. 4th 335, 108 Cal. Rptr. 2d 776 (2001) 8

Egan v. Mutual of Omaha Ins., 24 Cal.3d 809, 169 Cal. Rptr. 691 (1979) 8

Guebara v. Allstate Ins. Co., 237 F.3d 987 (2001) 6

Mariscal v. Old Republic Life Ins. Co., 42 Cal. App. 4th 1617, 50 Cal. Rptr. 2d 224 (1996) 9

Statutes:

28 U.S.C. § 1254(1) 1

California Code of Regulations [Fair Claims Settlement Practices Regulations], California Administration Code, Title 10, Chapter 5, Subchapter 7.5, Article 1, Section 2695.5(b) 7

Petitioner respectfully petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The March 3, 2003 opinion of the Ninth Circuit Court of Appeal (App., infra, pages 2a-17a) is reported at 322 F.3d 660. The April 3, 2003 order of the Ninth Circuit Court of Appeal (App., infra, page 1a) denying the petition for rehearing is unpublished. The July 2, 2001 order of the District Court, Central District of California, (App., infra, pages 18a-35a) granting Allstate's motion for summary judgment is unpublished.

STATEMENT OF JURISDICTION

The original opinion of the Ninth Circuit Court of Appeal was filed on March 5, 2003. Petitioner's timely petition for rehearing was denied on April 3, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Overview of the Case

The District Court issued an order affirming a motion for summary judgment filed by Allstate and denied a motion for summary judgment filed by Feldman. The District Court order resulted in the dismissal of all claims. The Ninth Circuit Court of Appeal affirmed the judgment of the District Court in part, reversed in part, and remanded. The issue raised in this petition is now limited to that portion of the Court of Appeal's decision affirming the District Court's

dismissal of the cause of action for breach of the implied covenant of good faith and fair dealing.

The Court of Appeal affirmed the District Court's order with respect to the dismissal of this cause of action on the grounds that, under the "genuine dispute" doctrine, the conduct of the insurer, Allstate, was reasonable as a matter of law. Consequently, the Court of Appeal found that while Allstate may owe policy benefits that were previously denied to Feldman, the denial of those policy benefits by Allstate was not done in bad faith as a matter of law.

Feldman contends that the decision affirming the dismissal of this cause of action was in error. Feldman contends that there are material questions of fact from which a jury could conclude that Allstate's actions were not undertaken in good faith.

Allstate refused to provide the evidence purportedly used in support of the denial to Feldman for his consideration and/or response. Allstate's conduct in this regard is not reasonable as a matter of law. In fact, Allstate's conduct violated California law in several respects in that an insurer must conduct a thorough investigation (considering all relevant sources of information), in that an insurer must make reasonable efforts to keep the insured informed of the status of the case, and, perhaps most importantly, in that an insurer must seek out witnesses and/or evidence that does not tend to solely support denial of the claim.

Therefore, while there were numerous objections raised with respect to the purported reasonableness of the conduct of Allstate, this petition focuses primarily on the portion of the Court of Appeal decision holding that Allstate had no affirmative duty to provide Feldman with an opportunity to

directly respond to the evidence used to support the denial of the claim.

The affirmative duty to permit the insured the opportunity to respond to claim decisions (and the evidence used in support of those decisions) flows from the insurer's continuing obligation to conduct a thorough and unbiased investigation of the claim and to avoid consideration of only that evidence that supports the denial of the claim.

Feldman was compelled to file this litigation to obtain the evidence purporting to support Allstate's denial of the insurance claim. Questions of fact exist as to whether Allstate's decision to withhold that evidence was reasonable.

II. Factual Background of the Case

Appellant Feldman purchased a standard homeowner's insurance policy from Allstate effective July 30, 1998. On February 22, 1999, Feldman's home was burglarized.

At the time of the burglary, Feldman was separated from his then wife, Lauren Feldman. The evidence in support of the motions, which was comprised in part of declarations and depositions, reflects that Marc Feldman was seeking a reconciliation with his former wife, while his former wife was engaged in a concerted attempt to obtain evidence that could be used against Marc Feldman in divorce proceedings (which also involved the custody of their children).

On the evening of the burglary, Feldman contacted Lauren Feldman and told her about what he had found at the home. Unknown to Feldman, Lauren Feldman was tapping that conversation. Subsequent conversations were also tapped (although it is interesting to note that only two tapes were

produced while it is evident that many conversations occurred).

Feldman filed a policy report for certain personal property stolen during the burglary. Feldman also filed a claim with Allstate for most of the personal property that he had identified as being stolen.

On February 25, 1999, Allstate contacted Feldman and asked Feldman to prepare a proof of loss statement. Feldman advised Allstate that he did not personally purchase the property and referred Allstate to Lauren Feldman for more information. On March 15, 1999, a representative of Allstate met with Feldman to discuss the claim. At that time a recorded statement was taken. Feldman confirmed that he did not personally purchase the stolen items, did not know their true value, and had no supporting documentation or photographs of the stolen items. On April 1, 1999, Feldman provided Allstate with a sworn statement, in which he valued the property at "approximately" $24,900.

On August 19, 1999, Lauren Feldman submitted to an Examination Under Oath, taken by counsel for Allstate. During that examination, Lauren Feldman valued the property at an amount substantially less than the amount placed on the property by Feldman.

At this examination, Lauren Feldman produced two tape recordings of conversations that she had with Feldman. Based on those tape recording, and the fact that there was no documentation, Allstate denied the Feldman claim stating:

> "…. Although you testified at your examination under oath that the value you assigned to the items claimed stolen were your

best estimates, we have reason to believe that you lied and knew that the values you assigned to the items were grossly overinflated."

This reference to lying was based on the conversations between Lauren Feldman and Allstate and the evidence that she provided to Allstate at that examination. Allstate admitted in the course of the motions for summary judgment that "after denying Mr. Feldman's claim and before Mr. Feldman filed his complaint against Allstate, Allstate Insurance Company refused Mr. Feldman's request to give him the tape recordings of his confidential telephone conversations with his wife, and the transcript of the Examination Under Oath of Lauren Feldman."

In support of the motion for summary judgment, Feldman also provided evidence (declarations) in which he stated that Allstate indicated that Feldman would have to sue to obtain copies of the evidence used to deny his claim. Feldman further states that he was subsequently informed by Allstate that Allstate had entered into a confidential agreement with Lauren Feldman agreeing never to release the information that she had provided to Allstate.

After the filing of the Complaint in this action, and in response to a formal document request, Allstate eventually produced the evidence that had been relied on to deny the claim. As noted above, the Ninth Circuit Court of Appeal has found that Allstate had no duty to disclose and that its actions were reasonable as a matter of law.

REASONS FOR GRANTING THE WRIT

The Federal and State Courts have recently struggled with the limits of the "genuine dispute" doctrine. Under this

California doctrine, a bad faith claim can be dismissed if the defendant can show that there is a genuine dispute as to coverage. *Guebara v. Allstate Ins. Co.*, 237 F.3d 987 (2001). Courts have readily acknowledged that the doctrine must be considered on a case-by-case basis. *Id.* , at 994.

In this case, the Ninth Circuit has applied this doctrine to a factual dispute in holding that Allstate acted reasonably. Feldman submits that the application of "genuine dispute" doctrine to the facts in this action does not support the holding of the Court. As expressly noted in *Guebara,* the "genuine dispute" doctrine does not shield insurers from bad faith claims based on biased investigations.

Herein, Allstate accepted (even adopted) the testimony of a witness whose credibility was certainly suspect (Lauren Feldman). Allstate never afforded Feldman the opportunity to review that evidence against him or to respond to that evidence in any meaningful manner.

1. The Ninth Circuit erred when it concluded that the insurer, Allstate, had no affirmative duty to provide the insured, Feldman, with an opportunity to respond to the evidence used to deny the insurance claim.

As noted above, the Ninth Circuit Court of Appeal held that Allstate had no affirmative duty to provide the insured, Feldman, with an opportunity to directly respond to Lauren Feldman's allegations before denying the claim. In support of this holding, the Court noted that it was not unreasonable to deny this claim given that Lauren Feldman's statements tended to indicated fraud. This holding ignores a long line of California decisions affirming the insurer's duties to the

insured to conduct a thorough investigation before denying coverage.

To begin with, under California law, California Code of Regulations [Fair Claims Settlement Practices Regulations], California Administration Code, Title 10, Chapter 5, Subchapter 7.5, Article 1, Section 2695.5(b), an insurer must furnish the insured with a complete response to a request for facts or information regarding a claim. Section 2695.5(b) provides as follows:

> "(b) Upon receiving any communication from a claimant, regarding a claim, that reasonably suggests that a response is expected, every licensee shall immediately, but in no event more than fifteen (15) calendar days after receipt of that communication, furnish the claimant with a complete response based on the facts as then known by the licensee. ...."

Prior to the initiation of the litigation, Feldman requested the evidence / facts that had been used in support of the denial of his claim. That request was denied and, in fact, Allstate advised that Feldman would have to sue to obtain the information. Feldman submits that this conduct was not reasonable and that it in fact violated the California insurance regulations regarding an insurer's obligations for responding to a claim from an insured.

2. Under California law, and given Allstate's duty to conduct a thorough investigation of an insurance claim, Allstate have an affirmative duty to provide Feldman with an opportunity to respond to evidence relied on by Allstate to deny his claim.

In addition to the above-referenced statutory requirements for disclosure, Allstate also violated numerous California decisions regarding a full and fair investigation of claims submitted by insureds. As noted by the Courts, in California the law implies in every contract the covenant of good faith and fair dealing. *Egan v. Mutual of Omaha Ins.*, 24 Cal.3d 809, 818, 169 Cal. Rptr. 691 (1979). The implied promise requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement. *Id.* To protect the insured's interests it is essential that an insurer fully inquire into possible bases that might support the insured's claim. *Id.* , at 819.

In this case, Allstate certainly didn't undertake to inquire into relevant possible bases that might support the insured's claim. Failing to give the Feldman an opportunity to respond to the evidence upon which the claim is based does not meet the standards set forth above, and should not be construed as reasonable as a matter of law.

Furthermore, "the insurer's responsibility to act fairly and in good faith with respect to the handling of the insured's claim 'is not the requirement mandated by the terms of the policy itself - to defend, settle, or pay. It is the obligation ... under which the insurer must act fairly and in good faith in discharging its contractual responsibilities.'" [internal citations omitted]. *Chateau Chamberay Homeowners Assn. V. Associated International Ins.*, 90 Cal. App. 4th 335, 346, 108 Cal. Rptr. 2d 776 (2001).

In *Mariscal v. Old Republic Life Ins. Co.*, 42 Cal. App. 4th 1617, 1623, 50 Cal. Rptr. 2d 224 (1996), the Court of Appeal held that:

> "a trier of fact may find that an insurer acted unreasonably if the insurer ignores evidence available to it which supports the claim. The insurer may not just focus on those facts which justify denial of the claim."

Failing to provide Feldman with the evidence so that he could reasonably respond to that evidence if far more egregious than the framework for the proper investigation and resolution of claims cited above. In this case, Allstate effectively eliminated an entire source of investigation by foreclosing the possibility of Feldman responding to the statements made by Lauren Feldman.

3. Assuming that Allstate had an obligation to provide Feldman with an opportunity to respond to the evidence, there are questions of fact as to whether Allstate's investigation was reasonable.

At a minimum, Allstate should be forced to explain its decisions and the jury should be permitted to view that evidence and determine whether the conduct was reasonable or not. The issue is not whether Feldman will prevail on his bad faith claims, but rather whether he has raised a genuine issue that should be decided by a jury. Feldman submits that the writ should be granted to determine if the Court's decision dismissing the cause of action was in error inasmuch as the issue is one that should go to a jury.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-56718
D.C. No. CV-00-10029-CBM
Central District of California, Los Angeles

[Filed April 3, 2003]

MARC FELDMAN,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
ALLSTATE INSURANCE COMPANY, et al.,	)
Defendants-Appellees.	)

ORDER

Before: FERGUSON, HALL, and BERZON, Circuit Judges.

Appellant's petition for rehearing has been reviewed by the court and is hereby DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-56718

[Filed March 5, 2003]

MARC FELDMAN, Plaintiff-Appellant,	)
v.	)
ALLSTATE INSURANCE COMPANY; VICKI WEED, Defendants-Appellees.	)

Appeal from the United States District Court
for the Central District of California
D.C. No. CV-00-10029-CBM
Consuelo B. Marshall, Chief Judge, Presiding

JUDGES:
Before: Warren J. Ferguson, Cynthia Holcomb Hall, and Marsha S. Berzon, Circuit Judges. Opinion by Judge Hall.

OPINION

HALL, Circuit Judge:

Marc Feldman appeals the district court's grant of summary judgment in favor of Allstate Insurance Company. The district court admitted, over Feldman's objection, testimony by his former wife, as well as taped conversations recorded in violation of California law. Based in part on this evidence, the district court held that Allstate had not breached the implied covenant of good faith and fair dealing, and that Feldman was entitled to neither declaratory relief nor damages.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We REVERSE the district court's decision to admit the illegally-recorded conversations into evidence, but nonetheless AFFIRM the district court's grant of summary judgment on the issue of breach of the implied covenant of good faith and fair dealing. We REVERSE as to Feldman's claim for declaratory relief, and REMAND for further proceedings consistent with this opinion.

FACTS

Appellant Feldman purchased a standard homeowner's insurance policy from Appellee Allstate Insurance Company, effective July 30, 1998. On February 22, 1999, Appellant's home was burglarized.

That evening, Appellant telephoned his then-wife, Lauren Feldman, to discuss the burglary and the items that had been stolen. At this time, the Feldmans were separated and engaged in an unpleasant custody dispute. In the context of the custody dispute, the Los Angeles Superior Court entered an order in

1997 authorizing the Feldmans to record telephone conversations with one another. Although the court order had expired on May 4, 1998, Lauren Feldman nonetheless secretly recorded the February 22, 1999 conversation.

Shortly after speaking with his wife, Appellant filed a police report with the LAPD, claiming the following losses: cash ($1,500), two jackets ($400 and $1,000), five paintings (total value $22,000), a diamond ring ($20,200), and a driveway remote ($0). The next day, Appellant filed a claim with Allstate for all items except the ring, which was covered under a separate policy.

Allstate contacted Appellant on February 25, 1999 to request proof of the losses claimed. Appellant told Allstate that he did not personally purchase the paintings and referred Allstate to Lauren Feldman for more information. On March 10, 1999, the Feldmans spoke for a second time by telephone about the value of the stolen items. The conversation was again recorded by Lauren Feldman without Appellant's knowledge. On April 1, 1999, Appellant gave a sworn statement to Allstate, which declared that the stolen paintings, jackets, cash, and garage door opener were valued at a total of "approximately" $24,900.

On August 19, 1999, Lauren Feldman was examined under oath by Allstate. She testified that the jackets were valued at approximately $75 each and that the paintings were purchased for amounts between $50 and $1500. Lauren Feldman also produced tapes of her conversations with Appellant, which she incorrectly asserted were recorded pursuant to court order.

On August 30, 1999, Allstate informed Appellant by letter that his claim was being denied for misrepresentation of value[1] and failure to submit written documentation.[2] Appellant filed suit against Allstate in Los Angeles Superior Court on July 13, 2000. Allstate subsequently removed the case to federal court, where both parties filed motions for summary judgment. On July 3, 2001, the district court entered its Order granting summary judgment to Allstate and denying summary judgment to Feldman. This appeal followed.

STANDARDS OF REVIEW

The timeliness of a notice of appeal is reviewed *de novo*. *In re Delaney*, 29 F.3d 516, 517 (9th Cir. 1994). We review a district court's grant of summary judgment *de novo*. *Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 916 (9th Cir. 2002). The determination of whether state or federal law applies in a diversity action is also reviewed *de novo*, and the *de novo* standard of review extends to the district court's construction of state law. *Olympic Sports Prod., Inc. v. Universal Athletic Sales Co.*, 760 F.2d 910, 912 (9th Cir. 1985).

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[1] Allstate's policy contains a fraud exception that provides: "We do not cover any loss or occurrence in which any insured person has concealed or misrepresented any material fact or circumstance."

[2] Allstate's policy provides: "In the event of a loss to any property that may be covered by this policy, you must ... give us all accounting records, bills, invoices, and other vouchers, or certified copies, which we may reasonably request to examine and permit us to make copies."

Generally, evidentiary decisions made in the context of summary judgment motions are reviewed for an abuse of discretion. *Maffei v. Northern Ins. Co.*, 12 F.3d 892, 897 (9th Cir. 1993). However, whether a party has waived an otherwise applicable privilege is a mixed question of law and fact and is reviewed *de novo*. *United States v. Amlani*, 169 F.3d 1189, 1194 (9th Cir. 1999).

JURISDICTION

As a threshold issue, this court must determine whether it has jurisdiction over the appeal. A notice of appeal "must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." FED. R. APP. P. 4(a)(1). Failure to timely file a notice of appeal necessarily results in dismissal for lack of appellate jurisdiction. *Scott v. Younger*, 739 F.2d 1464, 1466 (9th Cir. 1984).

The district court entered judgment in favor of Allstate on July 3, 2001. On July 13, Feldman filed a timely motion for reconsideration pursuant to Federal Rule of Civil Procedure 59(e). On July 30, the district court rejected Feldman's motion for reconsideration for failure to comply with Local Rule 7.4.1, which requires a statement that the parties conferred prior to filing. The following day, Feldman filed a corrected Rule 59 motion. On September 10, the district court denied Feldman's motion. Feldman filed a notice of appeal on September 21.

Feldman's notice of appeal was not filed within 30 days of the district court's entry of judgment. However, a timely motion for reconsideration tolls the time for filing the notice of appeal until the district court rules on the motion. *Scott*,

739 F.2d at 1467; FED. R. APP. P. 4(a)(4). In order to be timely, a Rule 59(e) motion must be filed within 10 days after entry of the judgment to be appealed. The parties agree that Feldman's July 13 motion was filed in a timely manner, but dispute whether the motion's failure to comply with Local Rule 7.4.1 rendered it incapable of tolling the time for appeal.

The tolling provision of the Federal Rules of Appellate Procedure, Rule 4(a)(4), states only that a motion must be "timely," and is silent as to whether a motion must be otherwise valid in order to toll the time for appeal. The Ninth Circuit has previously refused to read a validity requirement into the Rule. *See Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1459 n.1 (9th Cir. 1988), *vacated on other grounds*, 490 U.S. 1087, 104 L. Ed. 2d 982, 109 S. Ct. 2425 (1989) (holding that a procedurally invalid motion for JNOV can toll the time for appeal); *Sierra On-line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1420 (9th Cir. 1984) ("Even if a motion is inartfully drawn or so defective that it could not properly be granted it is still enough to toll the time for appeal.") (internal quotations omitted). In the spirit of these guiding precedents, we hold that Feldman's July 13, 2001 Rule 59(e) motion, despite its technical noncompliance with Local Rule 7.4.1, tolled the time for appeal until September 10, 2001, the date on which the district court ruled on its merits. Accordingly, Feldman's September 21 notice of appeal conformed to Rule 4(a). Having found jurisdiction over the instant appeal,[3] we turn to its merits.

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[3] Feldman also appeals the district court's December 13, 2002 issuance of sanctions. However, Feldman's Notice of Appeal preceded the issuance of sanctions, and references only "the final judgment and order of the district court, entered in this case on July

ADMISSIBILITY OF THE TAPED CONVERSATIONS

In the district court, Appellant argued that admission of conversations recorded by Lauren Feldman without Appellant's knowledge would violate § 632 of the California Penal Code, which provides, "[e]xcept as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding." CAL. PENAL CODE § 632(d). The district court rejected this argument as contrary to the law of this circuit. As the district court correctly noted, the Ninth Circuit has previously held that evidence obtained in contravention of state law is admissible in federal court, so long as no federal law is thereby violated. *E.g.*, *United States v. Cormier*, 220 F.3d 1103, 1111(9th Cir. 2000); *United States v. Adams*, 694 F.2d 200, 201 (9th Cir. 1982), *cert. denied*, 462 U.S. 1118, 77 L. Ed. 2d 1347, 103 S. Ct. 3085 (1983) ("[E]vidence obtained from a consensual wiretap conforming to 18 U.S.C. § 2511(2)(c) is admissible in federal court proceedings without regard to state law"). The instant case is distinguishable, however, because it is a diversity action. In diversity cases, a federal court must conform to state law to the extent mandated by the principles set forth in the seminal case of *Erie R.R. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817(1938). Pursuant to *Erie* and its progeny, federal courts sitting in diversity apply

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3, 2001." We have no jurisdiction to review the district court's issuance of sanctions.

state substantive law and federal procedural law. *Erie*, 304 U.S. at 78; *Wray v. Gregory*, 61 F.3d 1414, 1417(9th Cir. 1995).

Most evidentiary rules are procedural in nature, and the Federal Rules of Evidence "ordinarily govern in diversity cases." *Wray*, 61 F.3d at 1417. However, the Federal Rules do not supplant "*all* state law evidentiary provisions with federal ones." *Id.* (emphasis in original). Rather, state evidence rules that are "intimately bound up" with the state's substantive decision making must be given full effect by federal courts sitting in diversity. *Id.* (citing *Erie*). Moreover, some state law rules of evidence "in fact serve substantive state policies and are more properly rules of substantive law within the meaning of *Erie*." *Id.* (quoting 19 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4512 (1984)).

In *Wray*, the Ninth Circuit held that federal courts applying Nevada substantive law must also apply Nevada's rules regarding admissibility of the rulings of its medical malpractice screening panels. *Id.* at 1418. The Ninth Circuit noted that Nevada had established an integrated scheme for handling medical malpractice claims, in which the medical screening panels played a significant role. *Id.* Thus, Nevada's admissibility rules regarding the findings of its screening panels were properly characterized as substantive within the meaning of *Erie*. *Id.*

We hold that California Penal Code § 632, like the Nevada law at issue in *Wray*, is an exception to the general rule that the Federal Rules govern the admissibility of evidence in diversity cases. California Penal Code § 632 both

makes taping a confidential conversation a crime and limits the admissibility of illegally intercepted conversations. CAL. PENAL CODE § 632(a), (d). The statute thereby embodies a state substantive interest in the privacy of California citizens from exposure of their confidential conversations to third parties. We also note that the California Constitution expressly guarantees a right to privacy,[4] and that "having one's personal conversations secretly recorded [and replayed] may well infringe upon the right to privacy guaranteed by the California Constitution." *Rattray v. City of National City*, 51 F.3d 793, 797 (9th Cir. 1994). For these reasons, we hold that Penal Code § 632 is an integral component of California's substantive state policy of protecting the privacy of its citizens, and is properly characterized as substantive law within the meaning of *Erie*.[5]

Applying California law, the conversations at issue were recorded in contravention of § 632, and are not admissible.

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[4] CAL. CONST. ART. 1, SEC. I ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.")

[5] Our holding should not be construed to indicate that state exclusionary rules are always substantive and require application in federal diversity cases. As noted, California Penal Code § 632(d) is an integral part of a larger statutory scheme grounded in the fundamental privacy rights of California citizens. The primary motivation for the statute, it appears, is preventing both the taping and the use of such illicit tapes. Other rules excluding evidence solely to deter unlawful behavior may raise different considerations.

CAL. PENAL CODE § 632(d). However, testimony as to the content of a recorded conversation is admissible, to the extent that the witness or deponent "enjoys an untainted recall." *Frio v. Superior Court of Los Angeles*, 203 Cal. App. 3d 1480, 1493, 250 Cal. Rptr. 819 (1988) ("Nothing in the Privacy Act can be read so as to conclude a party whose confidential communications have been recorded gains greater protection than if they had not been so intercepted.").

On remand, the district court may not admit the tapes themselves into evidence. However, the court should admit Lauren Feldman's testimony to the extent that she enjoys independent recollection of the contents of the conversations at issue. Finally, should the district court exclude Ms. Feldman's testimony or portions thereof, Allstate is entitled to introduce the recorded conversations, as necessary, to impeach Appellant's testimony. *Frio*, 203 Cal. App. 3d at 1497.

WAIVER OF PRIVILEGE

Appellant argues that his conversations with Lauren Feldman are inadmissible as privileged marital communications. However, under California law the marital privilege is waived if "any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity." CAL. EVID. CODE § 912.

Appellant waived the privilege with respect to Lauren Feldman's deposition, explicitly stating, "Mr. Feldman is not asserting the confidential marital privilege for purposes of this deposition." The parties dispute whether, under California law, this selective waiver preserved Appellant's right to claim the privilege at trial.

At least one California court has recognized a party's ability to preserve a privilege through a limited waiver. In *People v. Aguilar*, 218 Cal. App. 3d 1556, 267 Cal. Rptr. 879 (1990), *overruled in part on other grounds*, *People v. Ervin*, 22 Cal. 4th 48, 90, 990 P.2d 506, 91 Cal. Rptr. 2d 623 (2000), the California Court of Appeal held that waiver did not occur when a criminal defendant selectively waived the privilege for purposes of a hearing conducted under California Rule of Evidence § 402. *Aguilar*, 218 Cal. App. 3d at 1564-65. The trial court in *Aguilar* erroneously held that the defendant's testimony was admissible only if it met the requirements of California Evidence Code § 975, which sets forth requirements for admissibility of *non*-defendant witness testimony. 218 Cal. App. at 1563. In order to comply with the trial judge's erroneous holding, defense counsel allowed the prosecution to examine privileged communications from the defendant's interviews with a hypnotist for the singular purpose of a hearing to determine whether post-hypnosis evidence should be admissible. *Id.* at 1565. Defense counsel specifically stated that the waiver was not intended to apply to any aspect of discovery. *Id.* Under these circumstances, the California Court of Appeal held that the privilege was not generally waived. *Id.*

By contrast, in the instant case Appellant clearly waived his privilege at least with respect to one component of

discovery -- Lauren Feldman's deposition. Moreover, Appellant does not contend that this limited waiver was induced by any action on the part of the trial court. Thus, *Aguilar* is inapplicable.

California cases do not specifically address whether a party can waive privilege for purposes of one or more aspects of discovery, then fully recover the privilege for purposes of summary judgment or trial. However, we decline to read a broad "selective waiver" rule into the California law of privilege. Such a rule would serve no constructive purpose in the discovery process, and would contravene the general rule that once confidential communications are disclosed to a third party the privilege is forever lost. *See, e.g., Markwell v. Sykes*, 173 Cal. App. 2d 642, 648, 343 P.2d 769 (1959) ("[I]t is well settled that once the privilege is waived it is gone for good.").

Moreover, even if a selective waiver could be recognized under the circumstances, Appellant responded to several questions regarding the allegedly confidential conversations during his February 5, 2001 deposition. Appellant was asked, "Do you have any recollection of telling [Lauren Feldman] ... to be vague and evasive?" Rather than objecting on privilege grounds, Appellant answered, "the tapes speak for themselves ... obviously the tape will be played before a jury, and the jury will make the decision." During the same deposition, Appellant specifically described portions of the recorded conversations, and also acknowledged that he and Lauren Feldman discussed the Allstate claim. A deponent does not necessarily lose a privilege by referencing a privileged communication. *People v. Hayes*, 21 Cal. 4th 1211, 1266, 989 P.2d 645, 91 Cal. Rptr. 2d 211(1999). However,

Appellant's responses to questioning during his February 5, 2001 deposition acknowledged not only the existence of the recorded conversations, but also their substance.

For these reasons, we find that Appellant waived the confidential marital communications privilege, and that the district court properly admitted Lauren Feldman's testimony.

THE "GENUINE DISPUTE" DOCTRINE

In order to establish a breach of the implied covenant of good faith and fair dealing under California law, a plaintiff must show (1) benefits due under the policy were withheld, and (2) the reason for withholding benefits was unreasonable or without proper cause. *Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 992 (9th Cir. 2001) (citing *Love v. Fire Ins. Exch.*, 221 Cal. App. 3d. 1136, 1151, 271 Cal. Rptr. 246 (1990)). Because the key to a bad faith claim is whether denial of a claim was reasonable, a bad faith claim should be dismissed on summary judgment if the defendant demonstrates that there was "a genuine dispute as to coverage." *Id.*

Allstate correctly asserts that, under the Ninth Circuit's interpretation of California law, a genuine dispute may concern either a reasonable factual dispute or an unsettled area of insurance law. 237 F.3d at 994. *See also Fraley v. Allstate Ins. Co.*, 81 Cal. App. 4th 1282, 1293, 97 Cal. Rptr. 2d 386 (2000) (holding that reliance on an expert opinion can create a genuine dispute). Specifically, a genuine dispute can be based "on the fraud language in the policy," even where the insured claims that the insurer's investigation was biased. *Guebara*, 237 F.3d at 996.

Feldman attempts to distinguish *Guebara* on a variety of grounds. Feldman notes that Allstate denied his claim in its entirely, whereas the *Guebara* plaintiff received payment for the undisputed portion of her claim. However, this argument is entirely unavailing since Feldman's claim was disputed in its entirety. Feldman also argues that *Guebara* extended the genuine dispute doctrine only to factual disputes created by differing expert opinions. However, *Guebara* specifically declined to place such a limit on its holdings, clarifying that the genuine dispute doctrine "should be applied on a case-by-case basis." *Guebara*, 237 F.3d at 994.

Under *Guebara*, a genuine dispute does not exist where there is evidence that the insurer failed to conduct a thorough investigation. *Guebara*, 237 F.3d at 996. Allstate interviewed Appellant, interviewed Lauren Feldman *at Appellant's request*, and waited nearly six months for Appellant to provide written documentation of the value of any of the items claimed. Despite Appellant's argument to the contrary, Allstate had no affirmative duty to provide him with an opportunity to directly respond to Lauren Feldman's allegations before denying the claim. In view of Lauren Feldman's statements tending to indicate fraud and the complete lack of documentary support for Appellant's $24,900 valuation, it was not unreasonable for Allstate to deny the claim.

Appellant also argues that Allstate's investigation was insufficiently thorough because the matter was not submitted to an appraiser. Appellant's argument here is similarly unavailing. The Policy does not require Allstate to submit all disputed matters to an appraiser. Rather, it provides that "either party may make written demand for an appraisal."

During the six months that his claim was pending, Appellant made no such demand. Moreover, it is not clear what items would be "appraised," given that the items had been stolen and Appellant was able to give only a very rough description of their appearance. Thus, Allstate's failure to submit the matter to an appraiser does not render its investigation insufficiently thorough.

The parties agree that, when prompted for documentation as to value, Appellant referred Allstate to Lauren Feldman. It was thus not unreasonable for Allstate to rely on statements by Lauren Feldman as to the value of the stolen items. The parties also agree that Lauren Feldman told Allstate that Appellant had purposely inflated the value of the stolen goods. Finally, the parties agree that Appellant never amended or resubmitted his claim, even after he became aware that the goods may have been worth much less than $24,900. It was not unreasonable for Allstate to rely on these circumstances to conclude that Appellant's original claim may have been fraudulent. Such reasonableness is all that need be shown, even if it would be possible for a trier of fact to determine that Allstate ultimately is liable under the policy. *See Franceschi v. American Motorists Ins. Co.*, 852 F.2d 1217, 1220 (9th Cir. 1988) (applying California law and stating that "a court can conclude as a matter of law that an insurer's denial of a claim is not unreasonable, even if the court concludes the claim is payable under the policy").

For these reasons, we affirm the district court's grant of summary judgment in favor of Allstate on the issue of breach of the implied covenant of good faith and fair dealing.

DECLARATORY RELIEF

Feldman also appeals the district court's decision to grant summary judgment on the issue of declaratory relief as to whether the insurance policy at issue covers his claim. A genuine dispute is sufficient basis to conclude that Allstate did not act in bad faith by denying Appellant's claim. However, a genuine dispute does not dispose of Appellant's claim for declaratory relief. *See Franceschi*, 852 F.2d at 1220.

In order to affirm the district court's grant of summary judgment on the claim for declaratory relief, we must find that Appellant misrepresented the value of the stolen goods, as a matter of law. The basis for the district court's decision was that "it is undisputed that [Feldman] misrepresented the value of the stolen items." The district court relied in part on the content of illegally recorded conversation in reaching this conclusion. As noted above, the conversations are inadmissible under § 632 of the California Penal Code. Without the tapes, the issue of fraudulent misrepresentation is very much disputed and is essentially Appellant's word against Lauren Feldman's.

Viewing the facts in the light most favorable to Feldman, Lauren Feldman's testimony does not prove, as a matter of law, that Feldman actually submitted a fraudulent claim. We therefore reverse and remand on the issue of declaratory relief.

AFFIRMED in part, REVERSED in part, and REMANDED. Each party shall bear its own costs.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA,
WESTERN DIVISION

No. CV 00-10029 CBM (Rcx)

[Filed July 2, 2001]
[Plaintiff's Motion filed April 27, 2001;
Defendant's Motion filed April 30, 2001]

MARC FELDMAN, Plaintiff	)
vs.	)
ALLSTATE INSURANCE COMPANY, Defendant	)

JUDGES:
CONSUELO B. MARSHALL, UNITED STATES DISTRICT JUDGE.

ORDER Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Motion for Summary Judgment

The matters before the Court, the Honorable Consuelo B. Marshall, United States District Judge presiding, are (1) Plaintiff's Motion for Summary Judgment, (2) Defendant's

Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgment of Issues, (3) Plaintiff's Evidentiary Objections to the Admissibility of Mrs. Feldman's Testimony and Tape Recordings of Plaintiff's Conversations with Mrs. Feldman, (4)'Defendant's Evidentiary Objections and (5) Plaintiff's Request for Judicial Notice. Counsel appeared before the Court on June 11, 2001. Upon consideration of the arguments presented, the Court (1) denies Plaintiff's Motion for Summary Judgment, (2) grants Defendant's Motion for Summary Judgment, (3) overrules Plaintiff's evidentiary objections, (4) sustains in part, overrules in part Defendant's evidentiary objections and (5) grants Plaintiff's Request for Judicial Notice.

JURISDICTION

This action is before the Court pursuant to 28 U.S.C. § 1332.

PROCEDURAL HISTORY

Plaintiff Marc Feldman filed this action against Defendants Allstate Insurance Company and Ms. Vicki Weed[1] in Los Angeles Superior Court on July 13, 2000. The Complaint sets forth claims for (1) Breach of the Implied Covenant of Good Faith and Fair Dealing and (2) Declaratory Relief. The gravamen of Plaintiff's Complaint is that Defendant Allstate denied Plaintiff's burglary claim under his

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[1] The Court granted the parties' stipulation to dismiss Ms. Weed with prejudice on May 23, 2001. The parties remaining in the lawsuit are Plaintiff and Defendant Allstate Insurance.

homeowner's policy in bad faith. Defendant Allstate removed this action to federal court on September 18, 2000, on the basis of diversity jurisdiction.

Plaintiff filed a Motion for Summary Judgment on April 27, 2001. Plaintiff argues there is no material factual dispute that Defendant breached the insurance policy and that Plaintiff is entitled to judgment and punitive damages. Defendant filed an Opposition and Objections to Plaintiff's Evidence on May 7, 2001. Plaintiff filed a Reply on May 10, 2001.

Defendant filed a Motion for Summary Judgment or in the alternative, for Partial Summary Judgment on April 30, 2001. Defendant seeks judgment on Plaintiff's declaratory relief and bad faith breach of implied covenant of good faith and fair dealing claims. Plaintiff filed an Opposition, Objections to Defendant's Evidence and a Request for Judicial Notice on May 7, 2001. Defendant filed a Reply and Objections to Plaintiff's Evidence on May 14, 2001.

BACKGROUND

The following facts are undisputed:

Plaintiff purchased an Allstate Deluxe Plus Homeowner's Policy, Policy No. 3515037790266 (the "Policy") from Defendant in July 1998. The insureds under the Policy were Plaintiff and his former wife, Lauren Feldman.[2] The Policy insured the Feldmans' residence and personal property from

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[2] Mrs. Feldman has remarried and has assumed the name of Mrs. Lauren Trevino.

July 30, 1998 through July 30, 1999. The Policy had a $500 deductible, with a $200 limit for cash losses.

The Policy states that, in event of property loss, the insured "must . . . give [Allstate] all accounting records, bills, invoices and other vouchers, or certified copies, which [Allstate] may reasonably request to examine." Policy at 21 (Wayne Beaudoin Decl., Ex. A). The Policy also states that Defendant Allstate "may cancel this policy for . . . material misrepresentation, fraud or concealment of material fact in presenting a claim, or violation of any of the policy terms." Policy at 6. The Policy further provides that Defendant Allstate does "not cover any loss or occurrence in which any insured person has concealed or misrepresented any material fact or circumstance." Policy at 6.

Plaintiff's residence was burglarized on February 22, 1999. Plaintiff telephoned Mrs. Feldman on February 22, 1999, after discovery of the burglary. Mrs. Feldman taped their conversation without informing Plaintiff.[3] Plaintiff reported the burglary to the LAPD and stated that a black leather jacket, a Tommy Hilfiger brand ski jacket, five paintings, a 2.4 karat diamond ring in a platinum setting, $1,500 in cash and a driveway remote control were stolen from the residence. Plaintiff estimated that the collective value of the five paintings was $22,000.

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[3] The parties dispute the content of Plaintiff's February 22, 1999 conversation with Mrs. Feldman. Plaintiff objects to the admission of the tape on the grounds that the recording violated California Penal Code § 632.

Plaintiff notified Defendant of the burglary on February 23, 1999. Defendant Allstate requested on February 25, 1999, that Plaintiff submit proof of loss on the claim. Mr. Feldman told Defendant that he did not personally purchase the paintings and referred Defendant to Mrs. Feldman to determine the value of the stolen paintings. Plaintiff telephoned Mrs. Feldman on March 10, 1999 to discuss the value of the stolen paintings. Mrs. Feldman taped the conversation without informing Plaintiff.[4] Plaintiff stated, in a "Sworn Statement in Proof of Loss" on April 1, 1999 that the stolen items, excluding the diamond ring, was valued at $24,900. Plaintiff also estimated the value of the stolen items to be $24,900 during an examination under oath on June 1, 1999.

Mrs. Feldman submitted to an Examination under Oath on August 19, 1999. Mrs. Feldman testified that Mr. Feldman attempted to enlist her in a plan to defraud Defendant regarding the value of the paintings. Mrs. Feldman stated that two of the stolen paintings were worth about $1000 each and the three remaining paintings were worth between $50-$500 each. Mrs. Feldman testified that the black leather jacket and ski jacket were worth $150 and $75, respectively. She also produced the tape recordings of her telephone conversations with Plaintiff.

Defendant Allstate notified Plaintiff on August 30, 1999 that his claim was denied for failure to provide proof of loss

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[4] The parties disagree on the contents of the conversation. Plaintiff objects to the admissibility of the tape recording of his March 10, 1999 conversation with Mrs. Feldman.

and for making material misrepresentations regarding the value of the paintings.

DISCUSSION

I. Evidentiary Objections

A. Plaintiff's Evidentiary Objections

Plaintiff objects to the admissibility of the tape recordings of Plaintiff's February 22, 1999 and March 10, 1999 telephone conversations with Mrs. Feldman and the transcripts of such conversations. Plaintiff further objects to the admissibility of Mrs. Feldman's Examination under Oath.

1. Admissibility of the Tape Recordings

Plaintiff argues that Mrs. Feldman secretly taped their conversations in violation of Section 632 of the California Penal Code.

The California Privacy Act makes it illegal for any person to intentionally record a confidential communication without the consent of all parties to the communication" CAL. PENAL CODE § 632(a). A communication is not confidential if the parties "may reasonably expect that the communication may be overheard or recorded." CAL. PENAL CODE § 632(c). "No evidence obtained as a result of . . . recording a confidential communication in violation of [the California Privacy Act] shall be admissible in any judicial, administrative, legislative or other proceeding." CAL. PENAL CODE § 632(d).

However, federal courts have admitted into evidence recorded communications, even though illegal under state law, if the recording is legal under federal law. See, e.g., *United States v. Daniel*, 667 F.2d 783, 784 (9th Cir. 1982); *United States v. Adams*, 694 F.2d 200, 201 (9th Cir. 1982). The federal Omnibus Crime Control and Safe Streets Act ("OCCSSA") prohibits the intentional recording of confidential communications. *See* 18 U.S.C. § 2511(1)(a). OCCSSA states that "it shall not be unlawful . . . for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication . . . unless such communication is intercepted for the purpose of committing any criminal or tortious act." 18 U.S.C. § 2511(2)(d); *accord Roberts v. Americable Int'l. Inc.*, 883 F. Supp. 499, 503 (E.D. Cal. 1995) (admitting recorded conversation into evidence under OCCSSA although such recording illegal under California Privacy Act).

Plaintiff argues that the recording of his conversations with Mrs. Feldman violated the California Privacy Act. Plaintiff telephoned Mrs. Feldman shortly after discovering that his home had been burglarized on February 22, 1999. Defendant argues that Plaintiff could not have reasonably expected the communication to be confidential since Plaintiff was aware that, pursuant to a November 12, 1997 Stipulated Temporary Restraining Order ("TRO") in divorce proceedings in Los Angeles Superior Court, the parties were permitted to record conversations between themselves. However, the TRO expired on May 4, 1998. Feldman Decl. P 8.

Defendant further argues that Mrs. Feldman's recording of her telephone conversations with Plaintiff was permissible

under OCCSSA. Mrs. Feldman, as a party to the conversations, was not prohibited from recording them under federal law. Plaintiff has produced no evidence (and has made no allegation) that Mrs. Feldman recorded the calls for an illegal purpose. The Ninth Circuit has permitted the admission of recorded communications when such recordings were legally made under federal law -- even though the recordings were illegal under state law. *See United States v. Adams*, 694 F.2d 200, 201 (9th Cir. 1982). Plaintiff's motion papers do not address the effect of OCCSSA on the admissibility of the tape recorded conversations.

Based on the foregoing, the Court overrules Plaintiff's objections to the admission of the tape recordings of his February 22, 1999 and March 10, 1999 conversation with Mrs. Feldman.

2. Admissibility of Mrs. Feldman's Testimony

Plaintiff argues that evidence from Mrs. Feldman's Examination under Oath is inadmissible because such evidence violates Plaintiff's marital communication privilege.

Federal Rule of Evidence 501 provides that, in diversity cases, a person's right to exert a privilege is governed by state law.[5] FED. R. EVID. 501; *see also Star Editorial, Inc. v.*

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[5] Federal Rule of Evidence 501 states, in relevant part, that "civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." FED. R. CIV. P. 501.

United States District Court, 7 F.3d 856, 859 (9th Cir. 1993). Under California law, "a spouse . . . has a privilege during the marital relationship and afterwards . . . to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife." CAL. EVID. CODE § 980. The privilege does not extend to communications made "to enable or aid anyone to commit or plan to commit a crime or fraud." CAL. EVID. CODE § 981.

Plaintiff argues that his statements during his telephone conversations with Mrs. Feldman are inadmissible as privileged marital communications. In his March 10, 1999 conversation with Mrs. Feldman, Plaintiff repeatedly asked Mrs. Feldman to tell Allstate that she could not remember the value of the stolen paintings -- even though Mrs. Feldman had told Plaintiff that the stolen paintings were worth far less than represented to Allstate. California's marital communication privilege does not protect Plaintiff's statements which were made to misrepresent the value of the paintings to Allstate. Plaintiff further argues that he has not waived his marital communications privilege. Plaintiff's argument erroneously presumes that the marital communications privilege applies.

Based on the foregoing, the Court finds that the marital communications privilege is inapplicable to Plaintiff's February 22 and March 10, 1999 telephone conversations with Mrs. Feldman.

B. Defendant's Evidentiary Objections

Defendant filed Objections on May 7, 2001, to Evidence Submitted in Support of Plaintiff's Motion for Summary Judgment. The Court sustains Defendant's Objections no. 1, 5-9, 12, 17, 21-24, 28 and 31-32. The Court sustains Defendant's Objection no. 15 as to the word "illegally" and overrules the remainder of Defendant's objection. The Court sustains Defendant's Objection no. 20 as to the phrase "depriving me of my right to assert my confidential marital privilege," but overrules the remainder of the objection. The Court sustains Defendant's Objection no. 29 as to the phrase "Mr. Feldman would have provided to Allstate prior to their denial of his claim, had they given him an opportunity to do so" and overrules the objection as to the phrase "wherein I provided Allstate with information effecting Lauren Feldman's credibility." The Court overrules Defendant's objections no. 2-4, 10, 11, 13, 14, 16, 18, 19, 25-27 and 30.

Defendant filed Objections on May 14, 2001 to Evidence submitted in support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment. The Court sustains Defendant's Objections no. 1, 5-9, 20, 24-27, 31, 33 and 36. The Court overrules Defendant's Objections no. 2-4, 10-12, 14-17, 19, 21, 22, 28-30, 32, 34, 35 and 37. The Court sustains Defendant's Objection no. 13 as to the word "illegally" and overrules the remainder of the objection. The Court sustains Defendant's Objection no. 18 as to the word "illegally" and overrules the remainder of the objection. The Court sustains Defendant's Objection no. 23 as to the phrase "depriving me of my right to assert my confidential privilege" and overrules the remainder of the objection.

II. Request for Judicial Notice

Plaintiff requests that the Court take judicial notice of Plaintiff's Complaint for Compensatory and Punitive Damages. The Court grants Plaintiff's Request for Judicial Notice.

III. Motions for Summary Judgment

Plaintiff and Defendant contend that there is no genuine dispute of material fact as to Plaintiff's breach of implied covenant and declaratory relief claims. Each argues that they are entitled to judgment as a matter of law.

"When parties submit cross-motions for summary judgment, 'each motion must be considered on its own merits." *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, Case No. 99-55830, 249 F.3d 1132, 1135 (9th Cir. 2001). Summary judgment against a party is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is *entitled to a judgment as a matter of law.*" FED. R. CIV. P. 56(c) (emphasis added). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Where the nonmoving party will have the burden of proof at trial, the movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case.

Id. If the moving party meets its initial burden, the nonmoving party must then set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence and draws all inferences in the light most favorable to the nonmoving party. *T.W. Elec. Svc., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987). The evidence presented by the parties must be admissible. FED. R. CIV. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Thornhill Pub. Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

A. Implied Covenant of Good Faith & Fair Dealing

Under California law, a covenant of good faith and fair dealing is implied in every insurance contract. *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 577, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973). A plaintiff establishes a claim for breach of implied covenant by showing that benefits due under the insurance policy have been unreasonably or improperly withheld. *Love v. Fire Ins. Exchange*, 221 Cal. App. 3d 1136, 1151, 271 Cal. Rptr. 246 (1990). An insurer breaches its implied duty by unreasonably delaying to process an insured's claim or by failing to properly investigate a claim. *Globe Indemnity Co. v. Superior Court*, 6 Cal. App. 4th 725, 731 (1992); *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d

809, 817, 169 Cal. Rptr. 691, 620 P.2d 141 (1979). "It is essential that an insurer fully inquire into possible bases that might support the insured's claim." *Egan*, 24 Cal. 3d at 819; *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 1096, 234 Cal. Rptr. 835 (1987). "Under California law, a bad faith claim can be dismissed on summary judgment if the defendant can show that there was a genuine dispute as to coverage." *Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 992 (9th Cir. 2001).

An insured may recover tort remedies, including punitive damages, upon proof that an insurer breached its duty to act fairly and in good faith. *Kransco v. American Empire Surplus Lines Ins. Co.*, 23 Cal. 4th 390, 400 (2000); *Delgado v. Heritage Life Ins. Co.*, 157 Cal. App. 3d 262, 277, 203 Cal. Rptr. 672 (1984).

It is undisputed that the Policy required Plaintiff to submit "all accounting records, bills, invoices and other vouchers . . . which Allstate may reasonably request" to verify the value of the insured goods. Plaintiff's Undisputed Facts P 4. Furthermore, the Policy states Allstate does "not cover any loss or occurrence in which any insured person has concealed or misrepresented any material fact of circumstance." Policy at 6. Plaintiff told Allstate, in a Proof of Loss statement, that the stolen paintings were worth $22,000. Plaintiff's Undisputed Facts P 11. Plaintiff, to this date, has provided no documentation supporting his estimate of the value of the stolen paintings. Plaintiff told Allstate that he did not purchase the paintings and that he did not have any firsthand knowledge of the value of the paintings. Plaintiff's Undisputed Facts P 12. At Plaintiff's direction, Allstate spoke with Mrs. Feldman, who had purchased the artwork. Plaintiff's

Undisputed Facts P 8. Mrs. Feldman informed Allstate that, contrary to her husband's estimate, the paintings were worth only about $2500 in total. Plaintiff's Undisputed Facts P 6. Mrs. Feldman also provided Allstate with tape recordings of conversations between her and Plaintiff, in which Plaintiff stated that he would "jack up" the price of the paintings on his insurance claim. (Allstate's Notice of Lodgement, Ex. 1 -- Tape Recording of February 22, 1999 Conversation between Plaintiff and Mrs. Feldman). Plaintiff stated, in his March 10, 1999 conversation with Mrs. Feldman that he did not want her to tell Allstate that the value of the paintings was about $2000. (Allstate's Notice of Lodgement, Ex. 2 -- Tape Recording of March 10, 1999 Conversation between Plaintiff and Mrs. Feldman).

There is no genuine factual dispute that Allstate's refusal to cover the loss of the stolen paintings was consistent with the terms of the Policy. Plaintiff has produced no evidence that Allstate's denial of coverage constituted a bad faith breach of the Policy.

Plaintiff argues that Allstate acted in bad faith by failing to investigate information which tended to support Plaintiff's insurance claim[6] and by examining Mrs. Feldman under oath without informing him. Plaintiff argues that Allstate should not have relied upon Mrs. Feldman's statements because Plaintiff and Mrs. Feldman were in the midst of a contentious

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[6] Plaintiff contends that Allstate conducted a criminal background check on Plaintiff and refused to turn over copies of the recorded conversations to Plaintiff.

divorce.[7] Plaintiff's reliance on *Mariscal v. Old Republic Life Ins. Co.*, 42 Cal. App. 4th 1617 (1966), is misplaced. In *Mariscal*, the California court stated that an insurer cannot solely seek out evidence which tends to support denial of a claim. *Id.* at 1623. The present case is distinguishable because it is undisputed that Allstate spoke with Mrs. Feldman and LAPD officers at Plaintiff's direction. Plaintiff directed Allstate towards the evidence that tended to support denial of his claim. *Mariscal* does not preclude Allstate from investigating evidence that supports denial of a claim.

Plaintiff argues that Allstate acted in bad faith by not disclosing the existence of the tape recorded conversations, Mrs. Feldman's adverse statements regarding the value of the stolen paintings and Mrs. Feldman's conversations with LAPD Detective Nancy Nelson. Plaintiff relies on *Delgado v. Heritage Life Ins. Co.*, 157 Cal. App. 3d 262, 203 Cal. Rptr. 672 (1984) for the proposition that Allstate was required to keep the insured informed of the status of his claim, including explaining the basis for denial. *Delgado* is inapplicable to the present case. It is undisputed that Allstate informed Plaintiff of the basis for its denial of his claim. Plaintiff's Undisputed Facts P 23. Furthermore, when Plaintiff submitted information to Allstate regarding Plaintiff's contentious relationship with Mrs. Feldman, Allstate reopened the file on Plaintiff's claim. Plaintiff's Undisputed Facts P 32. There is

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[7] Plaintiff submitted evidence that he and Mrs. Feldman were legally separated since 1997, that Mrs. Feldman had accused Plaintiff of child molestation and that Mrs. Feldman had a history of alcohol abuse and fraudulent activity. Plaintiff's Uncontroverted Facts P 30.

no evidence that Allstate was unresponsive to any inquiry by Plaintiff regarding the status of his claim.

Plaintiff argues that Allstate acted in bad faith by relying upon Plaintiff's "illegally" taped conversations with Mrs. Feldman in denying his claim. As discussed above, the taping of Plaintiff's conversation with Mrs. Feldman did not violate federal law. Furthermore, it is undisputed that Mrs. Feldman told Allstate that she was authorized by the LAPD to tape her conversations with her husband. Plaintiff's Undisputed Facts P 14. Thus, even if Plaintiff's conversations were illegally taped, there is no evidence that Allstate was aware of such alleged illegality at the time Allstate received the tapes from Mrs. Feldman.

Plaintiff further argues that Allstate acted in bad faith by refusing to settle Plaintiff's claim. Plaintiff relies on *Liberty Transport, Inc. v. Harry W. Gorst* Co., 229 Cal. App. 3d 417, 280 Cal. Rptr. 159 (1991) for the proposition that an insurer has a duty to promptly pay and settle claims. However, in the present case, the Policy excludes coverage for any loss or occurrence in which the insured has made a material misrepresentation of fact. Policy at 6. Allstate was under no duty to settle Plaintiff's claims because there was a genuine dispute as to Allstate's duty to pay. *See Guebara*, 237 F.3d at 992.

Based on the foregoing, the Court finds that there is no triable issue of fact as to Plaintiff's claim for breach of implied covenant of good faith and fair dealing and that Defendant is entitled to judgment as a matter of law.

B. **Plaintiff's Claim for Declaratory Relief**

Plaintiff seeks declaratory relief that he is entitled to indemnification for the stolen paintings under the Policy. Complaint P 21. The Policy states that Allstate will not insure "any loss or occurrence in which any insured person has concealed or misrepresented any material fact or circumstance." Policy at 6. It is undisputed that Plaintiff misrepresented the value of the stolen items. Therefore, Plaintiff is not entitled to indemnification under the Policy.

The Court finds that no triable issues of fact exist as to Plaintiff's claim for declaratory relief and that Defendant is entitled to judgment as a matter of law.

CONCLUSION

Based on the foregoing, the Court **DENIES** Plaintiff's Motion for Summary Judgment. Defendant's Motion for Summary Judgment and Plaintiff's Request for Judicial Notice is **GRANTED**. The Court **OVERRULES** Plaintiff's Evidentiary Objections to Mrs. Feldman's testimony and the Tape Recorded Conversations between Plaintiff and Mr. Feldman. The Court **SUSTAIN in part, OVERRULE in part** Defendant's Evidentiary Objections.

SO ORDERED.

DATE: June 29, 2001

/s/ _____
CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

JUDGMENT

The matter before the Court, the Honorable Consuelo B. Marshall, United States District Judge presiding, is Defendant's Motion for Summary Judgment. In accordance with Federal Rule of Civil Procedure 58, and consistent with the Court's Order of June 29, 2001, granting Defendant's Motion for Summary Judgment, IT IS ORDERED AND ADJUDGED that judgment be entered in favor of Defendant Allstate Insurance Company. Each party shall bear its own costs..

SO ORDERED.

DATE: June 29, 2001

/s/ _____
CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE